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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1980

UNITED STATES OF AMERICA,

Respondent,

v.

SNELLEN M. JOHNSON,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

POINT 1

IN RULING THAT THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS BASED ON PREJUDICIAL PRE-INDICTMENT DELAY, DID THE TENTH CIRCUIT COURT EITHER OVERLOOK THE ACTUAL PREJUDICE PRE-INDICTMENT DELAY CAUSED THE DEFENDANT AND/OR MISTAKENLY AFFIRM THE TRIAL COURT'S USE OF AN ERRONEOUS TENTH CIRCUIT TEST IN DETERMINING WHETHER OR NOT TO DISMISS ON GROUNDS OF PREJUDICIAL PRE-INDICTMENT DELAY.

POINT 2

WHETHER THE TRIAL COURT'S PERMISSION TO THE GOVERNMENT TO INTRODUCE THE GRAND JURY TESTIMONY OF A DECEASED WITNESS, MR. VEN SAVAGE, WAS AN ABUSE OF RULE 804(b)(5) OF THE FEDERAL RULES OF EVIDENCE, AND WHETHER THE COURT OF APPEALS, IN AFFIRMING THAT ACTION HAS OVERLOOKED BOTH THE STATUTORY PURPOSE OF THE CLAUSE AND THE ERRONEOUS UTILIZATION OF IT BY THE TRIAL COURT.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED----------	i
TABLE OF CONTENTS----------	ii
TABLE OF AUTHORITIES	
A. CASES----------	v
B. OTHER AUTHORITIES--------	vii
STATEMENT OF GROUNDS	
A. OPINIONS BELOW----------	1
B. JURISDICTION----------	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED----------	2
STATEMENT OF THE CASE	
A. PROCEDURAL HISTORY------	3
B. STATEMENT OF FACTS------	6
ARGUMENT	
POINT 1 IN RULING THAT THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS BASED ON PREJUDICIAL PRE-INDICTMENT DELAY, DID THE TENTH CIRCUIT COURT EITHER OVERLOOK THE ACTUAL PREJUDICE PRE-INDICTMENT DELAY CAUSED THE DEFENDANT AND/OR MISTAKENLY AFFIRM THE TRIAL COURT'S USE OF AN ERRONEOUS TENTH CIRCUIT TEST IN DETERMINING WHETHER OR NOT TO DISMISS ON	

GROUNDS OF PREJUDICIAL PRE-INDICTMENT DELAY---------- 11

POINT 2

WHETHER THE TRIAL COURT'S PERMISSION TO THE GOVERNMENT TO INTRODUCE THE GRAND JURY TESTIMONY OF A DECEASED WITNESS, MR. VEN SAVAGE, WAS AN ABUSE OF RULE 804(b)(5) OF THE FEDERAL RULES OF EVIDENCE, AND WHETHER THE COURT OF APPEALS, IN AFFIRMING THAT ACTION HAS OVERLOOKED BOTH THE STATUTORY PURPOSE OF THE CLAUSE AND THE ERRONEOUS UTILIZATION OF IT BY THE TRIAL COURT---------- 35

CONCLUSION---------- 65

APPENDIX

SLIP OPINION, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SNELLEN M. JOHNSON, Defendant-Appellant.-------- A2

ORDER OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITIONER'S PETITION FOR REHEARING------ A13

RULE 804(b)(5) OF THE FEDERAL RULES OF EVIDENCE------ A14

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED

Page

STATES---------- A15

THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES---------- A16

TABLE OF AUTHORITIES

A. CASES:

Alford v. United States, 282 U.S. 687 (1931).....53
Arnold v. McCarthy, 556 F.2d. 1377 (1978).....20
Barber v. Page, 390 U.S. 719 (1968).....55, 56
Berger v. California, 393 U.S. 314 (1968).....56
California v. Green, 390 U.S. 149, 155-156 (1970).....37
Chambers v. Mississippi, 410 U.S.284 (1973).....47, 48, 50, 59
Farkas v. United States, (C.C.A.) 2 F.2d 644.....53
Furlong v. United States, (C.C.A.) 10 F.2d 492, 494.....53
Greene v. McElroy, 360 U.S. 474 (1959).....54
In Re: Oliver, 333 U.S. 257 (1947)....54
King v. United States, (C.C.A.) 112 F. 988.....53
Kirby v. United States, 714 U.S. 47 (1899).....52
Laumer v. United States, 409 A.2d. 190 (D.C.C. App 1979).....31, 48
Linkletter v. Walker, 381 U.S. 618, 639 [1965].....56
Mattox v. United States, 156 U.S. 237, 242-243 (1895).....36, 52
People v. Moore, 96 App.Div. 56, 89 N.Y.S. 83,.....53
Pointer v. Texas, 380 U.S. 400 (1965).54
Reynolds v. United States, 98 U.S. 145 (1978).....36
Roberts v. Russell, 392 U.S. 293 (1968).....56
Talbert v. Jago, 607 F.2d. 753 (1979).....36

Tla-Koo-yel-lee v. United States, 167 U.S. 274.....53
United States v. Carlson, 547 F.2d. 1346 (8th Cir. 1976).....44, 47
United States v. Driscoll, 445 F.Supp. 864 (1974).....43
United States v. Fiore, 443 F.2d. 112 (2nd Cir. 1971).....43
United States v. Garner, 574 F.2d. 1141 (4th Cir. 1978).....46, 47
United States v. Gonzalez, 559 F.2d. 1271 (5th Cir. 1977).....41, 42
United States v. Guillette, 547 F.2d. 743 (2nd Cir. 1976)..31, 49, 50, 59
United States v. Henry, 448 F.Supp. 819 (1978).....43
United States v. King, 593 F.2d. 269, 272 and 273 (7th Cir. 1979)..21, 26
United States v. Lovasco, 431 U.S. 783 (1977).....12, 13, 18, 19, 20, 23
United States v. Marion, 404 U.S. 307 (1971).....12, 13, 16, 17, 18, 19, 20, 22, 23, 24, 26, 27, 32
United States v. Mathis, 559 F.2d. 294 (5th Cir. 1977).....40
United States v. Mays, 549 F.2d. 670 (9th Cir. 1977).....32, 34
United States v. Medico, 557 F.2d. 309 (2nd Cir. 1977).....40
United States v. Medina-Arellano, 569 F.2d, 349, 353 (1978).....21
United States v. Oropeza, 564 F.2d. 316, 325 (9th Cir. 1978)..31, 49, 50, 59
United States v. Radmall, 591 F.2d. 548 (10th Cir. 1979)..... 12, 24
United States v. Revada, 574 F.2d. 1047 (1978).....12
United States v. Satterfield, 572 F.2d. 687 (9th Cir. 1978)..30, 49, 50, 59
United States v. Titus, 576 F.2d. 210, 211 (1978).....21
United States v. Weaver, 565 F.2d. 129, 131 (1977).....22

United States v. West, 574 F.2d. 1131 (4th Cir. 1978).....45, 47
Washington v. Texas, 388 U.S. 14 (1967).....53

B. OTHER AUTHORITIES

Moore's Federal Practice, Volume 11, p. 209.....40, 64

5 Wigmore, Evidence, Section 1376 (3d Ed., 1940).....51

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Respondent,	)	PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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SNELLEN M. JOHNSON,	)	
Petitioner.	)	

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Snellen M. Johnson, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on December 29, 1980.

STATEMENT OF GROUNDS

A. OPINIONS BELOW

The December 29, 1980, slip opinion of the Court of Appeals of the Tenth Circuit, whose judgment is herein sought to be reviewed, was filed on December 29, 1980, and is reprinted in the appendix to this petition, pp. A2-A12. On January 14, 1981, the Petition for Rehearing filed by the Appellant was denied and the order is reprinted in the appendix to this petition, page A13.

B. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (21)(33)(34)(42)(46)(65) and (66).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rule 804(b)(5) of the Federal Rules of Evidence and the Fifth and Sixth Amendments to the Constitution of the United States which are set out verbatim in

the Appendix.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Petitioner, Snellen M. Johnson, was indicted in the United States District Court for the Division of Utah, Central Division, on or about April 27, 1979, with an indictment charging ten counts of violations of Sections 1014 and 2 of Title 18, of the United States Code, by providing and inducing others to provide fraudulent information on loan applications to a bank, which funds are insured by the Federal Deposit Insurance Corporation. The Petitioner was arraigned and pleaded not guilty. Trial was set for July 9, 1979, before the Honorable Aldon J. Anderson. Continuances were granted by the District Court, and trial eventually was set for September 17, 1979. On August 24, 1979, Petitioner, through his attorneys, made a

motion to dismiss on the grounds of prejudicial pre-indictment delay. Said motion to dismiss was entertained by the District Court and subsequently denied on August 31, 1979. Trial commenced on September 17, 1979, and continued five (5) days, concluding on September 21, 1979, when the jury returned a verdict of guilty on six of the ten counts charged in the indictment.

On the fifth day of trial, September 21, 1979, prosecution moved and was granted, over Petitioner's objection, permission to read into the record the Grand Jury testimony of a deceased witness, Ven Savage.

On October 22, 1979, Petitioner filed a motion for judgment of acquittal, or, in the alternative, motion for a new trial on six different grounds including a renewed argument focusing on prejudicial pre-indictment delay and also argument alleging trial Court error in admitting the Grand Jury testimony of the deceased witness, Ven

Savage. Said motion was denied by the District Court in an order dated November 5, 1979. On the same day, November 5, 1979, Petitioner noticed his appeal to the Tenth Circuit Court. The Petitioner was sentenced on November 5, 1979, to a term of imprisonment for two (2) years on each count, sentences to run concurrently. On March 25, 1980, Arthur H. Nielson and Bruce J. Nielson, trial counsel for Petitioner, filed a motion with the Tenth Circuit Court of Appeals for leave to withdraw as counsel. On April 24, 1980, Alan C. Chandler and James W. McConkie, filed their notice of appearance of counsel. Petitioner's appeal focused on Four points, two of which are the concern of this petition. First, that the trial court erred in denying Petitioner's motion to dismiss based on prejudicial pre-indictment delay because the Petitioner was actually and substantially prejudiced by the delay and the Trial Court applied an

erroneous test in determining whether or not to dismiss on grounds of pre-indictment delay. Second, that the Trial Court's permission to the government to introduce the Grand Jury testimony of Ven Savage constituted an abuse of Rule 804(b) (5) of the Federal Rules of Evidence and violated Petitioner's Sixth Amendment Right to confront witnesses against him. Petitioner's Appeal was denied by the Tenth Circuit on December 29, 1980. (See appendix) Petitioner's Petition for Rehearing on these two points was denied by the Tenth Circuit Court on January 14, 1981. (See Appendix) Motion for Stay of Mandate pending Petitioner's Application for Certiorari was denied by the Tenth Circuit on January 27, 1981.

B. STATEMENT OF THE FACTS

During the year 1975, the Petitioner affiliated with International Resources, Inc., a Utah corporation, with its principal of-

fices located in Salt Lake City, Utah. During that period various individuals took out loans with the Murray Branch of Commercial Security Bank through its branch loan officer, Stephen O. Summers, as an accommodation to International Resources, Inc., with the proceeds of such loans going to International Resources, Inc.

Said transactions occurred between January 30, 1975, and July 18, 1975. Because of alleged irregularities with regard to both the procedure used by the loan officer, Stephen O. Summers, and the information listed on the loan applications, an investigation by the government commenced about August 19, 1975. On October 7, 1975, the federal investigator advised Max D. Wheeler, Assistant United States Attorney for the District of Utah, of the facts developed to that point in an effort to establish a prosecution opinion concerning the individuals applying for and receiving

loans. Mr. Wheeler advised that he would consider prosecution of each individual borrower if it could be established that they provided false statements to Commercial Security Bank, Murray, Utah, to obtain a loan. However, no further investigation was conducted regarding the loans until the following year and then only on a sporadic basis.

Some three and one-half years later, or approximately four years after the alleged irregular loans were made, the facts of the case were presented by the United States Attorney's office to a Grand Jury; and, on or about April 27, 1979, a ten court indictment was returned against the Petitioner, charging him with violations of Title 18, United States Code, Section 1014 (the making of a false statement on an application for a loan at a bank insured by an agency of the United States government) and for violations of Title 18, United States Code, Section 2

(aiding and abetting the making of said false statements).

At the time the Loans were made, Petitioner was in the process of buying two Nevada ranches: one, called the Kearns Ranch, co-owned by Ven Savage, the deceased witness, and Arthur H. Sant, and a second, called the Aitken Ranch, owned by John Aitken. The latter was going to be bought by Savage and then sold to the Petitioner.

Two lists naming equipment on the two ranches were given to the Petitioner by Savage. These lists were the source of collateral used on the loans involved in Counts 2, 3, 5, 6 and 7 of the indicment and upon which Defendant was convicted.

Mr. Ven Savage, who was to have been called as a witness, died of a heart-attack on Tuesday, August 14, 1979, about a month before trial.

On the last day of trial the government called Special FBI Agent, Alfred M. Letizio

to the stand, and over objection of the Petitioner, was permitted to read into the record and before the jury the Grand Jury testimony of the deceased, Ven Savage.

The collateral on the loan in Count 4, the remaining Count of the indictment upon which the Defendant was convicted, involved a Mark IV Continental, which Petitioner possessed but to which he did not have title at the time the loan was taken out. Petitioner had purchased said vehicle with a Promissory Note to a Mr. Eugene England, title remaining in Mr. England's possession. Title has subsequently passed to Petitioner. Regarding his conviction on Count 4, Petitioner argued in his appeal to the Tenth Circuit that it was contrary to and not supported by the evidence and in addition was fatally tainted by the prejudicial introduction of the deceased Ven Savage's Grand Jury testimony in violation of Petitioner's Sixth Amendment right to confront a witness and to

his Fifth Amendment right to a fair trial. The Tenth Circuit declined to rule on Count 4 noting that a reversal on this Count would not change Petitioner's sentence, since they had affirmed his convictions on the remaining five counts.

On September 5, 1979, the jury returned a verdict of guilty on 6 of the 10 Counts of the indictment, to-wit; 2, 3, 4, 5, 6 and 7.

ARGUMENT

POINT 1

IN RULING THAT THE TRIAL COUNT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS BASED ON PREJUDICIAL PRE-INDICTMENT DELAY, DID THE TENTH CIRCUIT COURT EITHER OVERLOOK THE ACTUAL PREJUDICE PRE-INDICTMENT DELAY CAUSED THE DEFENDANT AND/OR MISTAKENLY AFFIRM THE TRIAL COURT'S USE OF AN ERRONEOUS TENTH CIRCUIT TEST IN DETERMINING WHETHER OR NOT TO DISMISS ON GROUNDS OF PREJUDICIAL PRE-INDICTMENT DELAY.

The Petitioner in good faith believes that this case involves "special and important reasons" which compel a review on Writ of Certiorari in the Supreme Court. In particular, the Petition involves a clear

conflict among the Circuit Courts with regarding to the test to be applied in determining when pre-indictment delay has violated Defendant's right to receive a fair trial as required by the due process clause of the Fifth Amendment. The test enunciated by the Tenth Citcuit, interpreting United States v. Marion, 404 U.S.307 (1971) and United States v. Lavasco, 431 U.S. 783 (1977), is at odds with tests laid down by the Seventh, Ninth, Fifth and Eighth Circuit Courts.

Since in this case the trial Court relied on the Tenth Circuit interpretation, one which the Petitioner respectfully submits is out of step with sister Circuits, a Supreme Court review is need to resolve the conflict.

To be specific, the Tenth Circuit in United States v. Radmall, 591 F.2d 548 (1978) and United States v. Revada, 574 F.2d 1047 (1978) interprets Marion and Lovasco as requiring a strict two-prong test:

> The rights of a Defendant under the Due Process Clause of the Fifth Amendment are not violated in the absence of a showing of actual prejudice resulting from the pre-indictment delay and that the delay was purposefully designed to gain tactical advantage or to harass the Defendant. (Emphasis added, Cites omitted) 574 F.2d at 1048.

This interpretation involves a misreading of the principles set down in Marion and Lovasco and completely ignores the majority view of other Circuit Court interpretations. In addition to the clear split among the Circuits on the test to the applied, there is the inherently unconstitutional nature of the test employed by the Tenth Circuit and the District Court in the instant case. This is outlined below.

On August 23, 1979, the Petitioner moved the trial court to dismiss the indictment based upon actual prejudice to the Petitioner caused by substantial pre-indictment delay. Pursuant thereto, the trial court held an evidentiary hearing to determine the

extent and severity of any prejudice which the Petitioner may have experienced due to the nearly four years of delay in bringing this case to trial. After hearing testimony from Alfred Letizio, special agent of the FBI, and hearing arguments of counsel, the court denied the motion to dismiss. The court held that actual prejudice to the Defendant must be shown as well as proof of an intent to gain tactical advantage over the Defendant by the government. The trial court found that such a standard was not met by the Defendant.

The Defendant renewed his motion to dismiss the indictment based upon actual prejudice to the Defendant caused by substantial pre-indictment delay on October 22, 1979, on the grounds that the evidence and testimony at trial clearly showed that the Defendant was unduly prejudiced by such delay in violation of his rights under the Fifth and Sixth Amendments of the United

States Constitution. The testimony of the various witnesses at trial demonstrated their inability to accurately recall events, particularly materially pivitol events (see following discussion). Documents could not be located (see following discussion) and a key witness to the defense, Mr. Ven Savage had died shortly before trial. As the evidence at trial finally focused on the issue of whether Mr. Ven Savage had given permission to the Petitioner to pledge collateral owned by Mr. Savage, his absence and loss of testimony severely handicapped the Petitioner's ability to rebut the statements of the loan officer, Mr. Summers, who handled the loans in question, himself convicted of a felony in connection with an irregular bank loan, as to discussions between Mr. Summers and Ven Savage, and also severely handicapped Defendant's ability to rebut statements made by Savage that contradicted Petitioner's own testimony.

The Statute of Limitations for a violation of 18 U.S.C. 1014 is five years (see 18 U.S.C. 3282.) The actions conplained of in the indictment occurred in the first half of 1975 and the indictment was returned four years later in 1979, apparently within the application of the Statute of Limitations. The Statute of Limitations specifies a limit beyond which there is an irrebutable presumption that the Defendant's right to a fair trial would be prejudiced. United States v. Marion, 404 U.S. 307, (1971). Obviously, the closer to the end of the limitations period prosecution is begun, the harder it is for the Defendant to receive a fair trial.

The Statute of Limitations, however, is not the only time constraint upon the government in bringing charges against a Defendant. Other pre-indictment occurrences which constitute prejudicial pre-indictment delay can constitute grounds for dismissal

of the indictment if the delay is such that the Defendant could not receive a fair trial as required by the due process clause of the Fifth Amendment of the united States Constitution.

Two important United States Supreme Court cases have discussed at length the exact issue presented herein. First, United States v. Marion, supra, discussed in detail the theory behind dismissal for prejudicial pre-indictment delay. The court held that to trigger such dismissal, actual prejudice to the conduct of the defense must be proven. The court further held that an examination into the reasons for the delay should also be undertaken by a court faced with such a motion to dismiss. The court said:

> Thus, the government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to Appellees' rights to a fair trial and that the delay was an

> intentional devise to gain tactical advantage over the accused. (Cites omitted) (404 U.S. at 324).

The court further held that:

> To accommodate the sound administration of justice to the rights of the Defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances in each case. 404 U.S. at 325. Emphasis added.

The court in Marion dealt with a situtation of a 38 month delay between the crime and the date of the indictment. The court found that the indictment should not be dismissed for the reason that no actual prejudice was alleged or proved and that there existed no showing that the government's delay was unjustifiable or unreasonable.

Post-Marion cases have applied the Marion standards under varying circumstances (see discussion hereafter). However, the second landmark Supreme Court case in this area of criminal law was handed down six years later. In United States v. Lovasco,

431 U.S. 783, (1977), the Supreme Court reviewed the issue in question herein and upheld the Marion position with respect to pre-indictment prejudicial delay. The court held that delay between the commission of an offense and the initiation of prosecution, during which time a necessary investigation was being conducted, does not deprive a defendant of due process under the Federal Constitution, even if his defense might have been somewhat prejudiced by the lapse of time (see 431 U.S. at 796).

The court in Lovasco indicated that:

> Proof of prejudice is generally a necessary but not sufficient element of the due process claim and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused (431 U.S. at 790, emphasis added).

Had the Supreme Court's decision in this case affirmed the idea that Marion established only one case where pre-indictment delay would be grounds for dismissal, that

being the showing of actual prejudice and that the delay was an intentional tactic by the prosecution to gain advantage over the accused, the Court in Lavasco would of necessity, and in the interest of clear law, have stated its ruling in Lovasco in the singular and not, as it did, in the plural. By requiring that "due process...must consider the reasons for the delay as well as the prejudice to the accused," (Emphasis added) the Supreme Court clearly allowed for the consideration of more than one set of circumstances where it would be appropriate to grant a dsmissal for pre-indictment delay.

Although most Circuit Courts have properly adhered to the rule of Marion and Lovasco, the Tenth Circuit has not; indeed, in the present case, the Tenth Circuit has completely ignored the intent and wisdom of the Court.

In 1978, in Arnold v. McCarthy, (556

F2d, 1377, the Ninth Circuit held that the due process test for impermissible pre-acquisition delay requires a delicate balance of the circumstances of each case. The Ninth Circuit observed, "Primarily, we must compare the gravity of the actual prejudice shown to the actual prejudice shown for the reasons for the delay." On another occasion, in United States v. Titus, (576 F.2d. 210, 211 (1978), the Ninth Circuit requires that three elements be considered:

1) Actual prejudice to the Defendant,

2) Length of delay, and

3) Reason for delay.

In 1979, in United States v. King, (593 F.2d. 269, 272 and 273) the Seventh Circuit held that inherent in the adoption of a balancing process is the notion that particular reasons are to be weighed against the particular prejudice suffered on a case by case basis. Similarly, in 1978, in United States vs. Medina-Arellano, (569 F.2d. 349,

353) the Fifth Circuit observed that, "in each case the prejudice to the defendant is to be weighed against the validity of the governments reason for delay." And, in United States v. Weaver, (565 F.2d. 129, 131 (1977) the Eight Circuit held that the reasonableness of the delay must be balanced against any result in prejudice to the Defendant.

In Marion, the Court indicated that if (1) actual prejudice were shown and (2) the pre-indictment delay was intentional on the part of the government to gain tactical advantage or harass the accused, that such a circumstance would mandate a dismissal of the indictment. Such a conclusion does not, however, require such a circumstance before an indictment can be dismissed. It merely states such a circumstance is an example of a violation of due process.

That such reasoning is correct is quickly apparent when one considers that in Lo-

Lovasco, the Court held that pre-indictment delay for investigative purposes does not deprive a Defendant of due process. If Marion had mandated a strict, two-pronged standard, the holding in Lovasco would be unnessary because pre-indictment investigation would obviously not fall within the class of intentional delay to gain tactical advantage or harass the Defendant. Nevertheless, the Court considered only another reason for pre-indictment delay and held that prosecution after investigation in accord with normal or required procedures, did not violate the due process clause of the Fifth Amendment. Thus, it is obvious that Marion discussed only an example of such a violation and not the general rule. In fact, Marion itself states that:

> To accommodate the sound administration of justice to the rights of the Defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances in each case. 404 U.S. at 325.

So far removed from the idea of setting down a rigid, cast-iron formula was the Marion court, that it did, in fact, indicate it would be "unwise" to forecast its decision in furture cases involving pre-indictment delays. (404 U.S. at 325) Moreover, because of the Court's insistence on a "delicate judgment based on the cirucmstances in each case," the Court clearly did not intend to convey the idea that only a pre-indictment delay by the government to gain a tactical advantage over the Defendant could constitute a violation of due process. Indeed, as Judge McKay, of the Tenth Circuit, wrote in a dissenting opinion in United States v. Radmall, (591 F.2d. 548 (10th Cir., 1979.); that the Marion Court's discussion represents "only a flagrant example of due process abuse."

Further, because the focus of concern in Marion lay with the Fifth Amendment guarantee of due process, the court could not have

insisted that a Defendant show a pre-indictment delay was "purposely designed to gain a tactical advantage." Such a requirement would place so heavy burden of proof on the Defendant that beyond the rarest of exceptions, it cannot be met. Indeed, how can a Defendant show that the government "purposely designed a delay so as to gain a tactical advantage." The government has many explanations for a delay, ranging from a manpower shortage to a pressing caseload to mere benign neglect, none of which could satisfy a purposeful delay. Yet, it is clear that each could cause a significant delay as so to severely prejudice a Defendant's right to due process of law. Short of a patently obvious malevolence on the part of the government, or perhaps a leaked memorandum, directing tactical delay or some serendipitous stroke of fortune, a Defendant is going to find it well nigh impossible to show that the government has deliberately delayed an

investigation to gain a tactical advantage.

The sheer weight of that burden is all the more reason to believe that the Marion Court, which was primarily concerned with the protection of the Defendant's right of due process, discussed a delay as an "intentional device" as a flagrant example of due process abuse. Indeed, if the Court had not meant that, the burden of proof upon a Defendant would be so immense as to dangerously reduce the Fifth Amendment guarantee of due process to a weak antisceptic, at best. In short, it is an unconstitutional test.

The teaching of Marion and other Circuit Court decisions around the country is clear: where the Defendant proves actual prejudice, the burden of proof shifts to the government to show that the delay was justified. United States v. King, 593 F.2d. 269 7th Cir.1979). It is then the task of a court, as charged by Marion, to "make a delicate judgment

based on the circumstances in each case."

Despite the clarity of the Court's position in Marion, the Tenth Circuit, in the present case, took the position that Marion required the Defendant to show that the delay indicated "bad faith on the part of the goverment." (Slip Opinion, p. 3) This position as we have argued above, is not only a misreading of the Marion Court's intention, but it is in violation of the Petitioner's right to due process of law given the near impossibility of proving that the government's delay indicated "bad faith."

In addition, the Tenth Circuit Court ruled that Defendant "failed to establish prejudice resulting from delay," (Slip Opinion, pp. 2-3), yet the record clearly indicates that Defendant suffered from prejudicial pre-indictment delay.

As indicated in the affidavit of Bruce J. Nielson, Petitioner's trial counsel, the crucial witness for the defense died shortly

before trial. This witness, Ven Savage, was prepared to testify that he had, in fact, given permission to pledge certain ranch equipment which he allegely owned as collateral on bank loans. The testimony of Mr. Savage would have negated at least one element of the government's claim of false statement regarding use of collateral on loans at Commercial Security Bank. Mr. Savage was, in fact, indispensable to the defense, for on five of the six counts upon which defendant was convicted, the indictment alleges that ranch equipment was used without permission as collateral and the representation on the loan application, with respect to such collateral, therefore, constituted a false statement. The death of Mr. Savage was, therefore, a severe blow to the defense, his testimony being exculpatory in character. But it was damaging as well to the discovery of truth at the trial, for Mr. Savage was the one person who could have

cut to the quick of the issue.

That Mr. Savage was prepared to testify on behalf of the Petitioner is clear from both the trial testimony of Mr. Clark Oborn (Tr. p. 1052) and the affidavit of Bruce J. Nelson. Both statements should be given great weight.

In major part, the testimony of Mr. Savage was not presented because the government waited an inordinate amount of time before it brought forth charges of indictment. The four-year lapse, the time between the point at which the investigation was substantially completed, and the date of indictment, was so long that had trial been held during any portion of a reasonable time framework, Mr. Savage would have been alive and able to deliver this truth-rending testimony.

Beyond the loss of Mr. Savage's testimony, the Petitioner is severely prejudiced by the four-year delay because of the time-

failed memories of several important witnesses who could neither recall many of the events themselves nor transactions, let alone details of those events and transactions. The trial is replete with failed memories and contradictions by witnesses.

Isolated instances of a diminution over time, in the memory of an occasional witness may not prejudice a Defendant's right to a fair trial, but when the pre-indictment delay causes a significant decline in the memory of most of the witnesses at trial, due pocess requires consideration of the substantive effect or cumulative impact of such lapses in memory. In fact, courts have often taken cognizance of the effect of time lapses on the memories of witnesses. For example, in United States v. Satterfield 572 F.2d 687 (9th Cir, 1978) the Ninth Circuit held that a two year lapse between the crime and declaration casts doubt on the reliability of the statements, and "reduces their

trustworthiness." Id. at 693, citing United States v. Oropeza, 564 F.2d 316 at 325; See also United States v. Guillette, 547 F.2d 743, 759 (2d Cir. 1976)and Laumer v. United States, 409 A.2d 190 (D.C.C.App. 1979).

We submit that the Court should carefully consider the substantive impact of the time lapse on the memories of witnesses. It is clear that this cumulative effect was substantial and clearly did prejudice defendant's right to a fair trial.

In addition to the loss of Mr. Savage's testimony and the considerably dimmed memories of the witnesses, documents were lost as a result of the passage of time as well. (TR. pp. 849 and 930) If the indictment had been returned when the investigation was substantially completed in October, 1975, these documents and other records would have been available to establish the existence of claimed facts. Moreover, the failure to produce these doucments bore particularly on

the Defendant's credibility before the jury, thus prejudicing his defense capabilities. Further, with the documents and records witnesses could have refreshed their failing memories with regard to the facts and circumstances surrounding the various loan transactions.

The government had enlisted the aid of United States v. Mays, 549 F.2d 670 (9th Cir. 1977) to indicate that the Defendant Snellen M. Johnson had failed to show any actual prejudice. In Mays, the court said:

> To establish actual prejudice sufficient to warrant a dismissal, the defendant must show not only the loss of the witness and/or evidence, but also just demonstrate how that loss is prejudicial to him . . .the latter proof must be definite and not speculative: The assertion that a missing witness might have been useful does not show the 'actual prejudice' required by Marion. 549 F2d at 677 (Citations omitted)

In a footnote, the court further explained:

> . . .(U)nless the Defendant can make some showing as to what the testimony would have been, or specifical-

> ly how the witness could have exonerated him, there is no way of knowing whether the Defendant is merely speculating to the contribution of the witness to his defense or perhaps even attempting to take advantage of the witness's unavailability to make a due process claim when it is in reality unfounded.

We have demonstrated above how the loss of the witness (Savage) is prejudicial to the Defendant, and "what the testimony would have been or specifically how the witness would have exonerated" the Defendant. Mr. Savage was, according to the trial testimony of Clark Oborn, and the affidavit of Bruce J. Nielson, prepared to testify that he had pledged certain ranch equipment as collateral for the loans in question. Since it is the grand jury testimony of Mr. Savage (testimony which he was willing to repudiate) that portrayed Defendant as pledging collateral that was not his, Savage was the one person who could set the record straight. He had, in fact, given petitioner permission to pledge the ranch equipment as collateral.

The significance of the testimony that Mr. Savage would have provided clearly demonstrates how costly the loss of the witness is to the Defendant. The significance is no less than exoneration of Defendant. The loss of that exculpatory testimony prejudiced the Defendant.

The exculpatory testimony would have been "definite and not speculative" and clearly, the witness was not merely "useful", but was, in fact, quite critical to Defendant. Thus, the criteria set forth in Mays for the purpose of establishing actual prejudice, is satisfied. The government's contention that, per Mays, Defendant was not prejudiced, is erroneous.

It is overwhelmingly plain, in the face of the foregoing, that the pre-indictment delay permitted an inordinate amount of time to pass, so that Defendant was severely prejudiced and thus denied due process of law. This denial of the Fifth Amendment rights

guaranteed to Defendant was reversable error and the trial court's and the Circuit Court's decisions should be reversed.

POINT 2

WHETHER THE TRIAL COURT'S PERMISSION TO THE GOVERNMENT TO INTRODUCE THE GRAND JURY TESTIMONY OF A DECEASED WITNESS, MR. VEN SAVAGE, WAS AN ABUSE OF RULE 804(b)(5) OF THE FEDERAL RULES OF EVIDENCE, AND WHETHER THE COURT OF APPEALS, IN AFFIRMING THAT ACTION HAS OVERLOOKED BOTH THE STATUTORY PURPOSE OF THE CLAUSE AND THE ERRONEOUS UTILIZATION OF IT BY THE TRIAL COURT.

This case involves the serious question of whether Defendant's Sixth Amendment right to confront and cross examine witnesses was violated by the Trial Court's admission of the testimony of Mr. Ven Savage, a deceased Grand Jury witness, under the catchall provisions of 804(b)(5) of the Federal Rules of Evidence.

In particular, to allow the admittance of the Grand Jury testimony to stand approved in this case through the use of Rule 804 (b)(5) would destroy the rule's consti-

tutional safeguards and set an egregious and ominous precedent. A Supreme Court review is needed to correct this error and define the scope, meaning and proper application of 804(b)(5) of the Federal Rules of Evidence.

As the trial court indicated, the present case is novel in character. The novelty is due to the fact that the key witness in the case, Mr. Ven Savage, who provided testimony before a grand jury, died before trial, thus making him unavailable for purposes of confrontation. The declarant's statement however, did not qualify as a "dying declaration," for there was no evidence that it was "made under a sense of impending death." Mattox v. United States, 13 S.Ct. at 53-54 (1892). Moreover, the unavailability of the declarant could not be attributed to either the defendant's "wrongful procurement," (Reynolds v. United States, 98 U.S. 145 (1978), or to any "threats" (Talbert v. Jago, 607 F.2d 753

(1979) on the part of the Defendant. Further, this case is clearly distinguishable from California vs Green, 390 U.S. 149, 155-156 (1970), in which a statement was admissable because it had been subjected to cross-examination. In the present case, there was no opportunity for cross-examination. For this reason, as our argument below indicates, we submit that Petitioner was denied his Sixth Amendment right to confrontation and judgment against him should therefore be reversed.

The trial court denied Petitioner's motion to exclude the Grand Jury's testimony of a deceased witness, Mr. Ven Savage. The Tenth Circuit upheld the action of the lower court, observing that "a trial court now has some latitude in admitting hearsay and we find no abuse of discretion here." (Slip Opinion, p.5). There is no question that a trial court now has some latitude, yet whatever latitude a trial court may have is

governed by Rule 804(b) of the Federal Rules of Evidence. The trial court apparently based its ruling upon Rule 804(b)(5) of the Federal Rules of Evidence, a "catchall" exception to the hearsay rule, which reads as follows:

> 804(b)(5) Other Exceptions: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the Court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules in the interest of justice will best be served by admission of the statement...(emphasis added).

It should be noted at the outset that in order to qualify under subsection (5), the statement must have "equivalent circumstantial guarantees of trustworthiness." Such a requirement makes reference to the other four hearsay exceptions in Rule 804(b): (1) former testimony given as a witness at a

prior trial or hearing when subject to cross-examination; (2) statements made under belief of impending death (dying declarations; (3) Statements made against the declarant's interest; and (4) statements made by the declarant about his personal or family history.

The four specific exceptions to the hearsay rule in 804(b) contain specific circumstances found by the framers of the rule to certain guarantees of trustworthiness and reliability. In the first exception, that of prior testimony, there is a specific requirement that the former testimony be subject to cross-examination in order to be admissible. It is the confrontation requirement and opportunity of cross-examination which gives that hearsay exception the guarantee of trustworthiness and reliability necessary to make such testimony admissible at a subsequent trial. The other three exceptions also contain stringent requirements

in order to make the statements admissible due to trustworthiness and reliablility.

The legislative history of Rule 804(5)(b) indicates that this catchall hearsay exception is to be rarely used.

> It is intended that the residual hearsay exceptions will be used very rarely, and only in excepional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in [Rule 803]. Moore's Federal Practice, Vol. 11, p. 209, quoting the United States Senate Sub-Committee Report.

Such a narrow reading of the catchall exception to the hearsay rule has been sanctioned by Courts since the Federal Rules of Evidence became effective in 1975. (see United States v. Mathis, 559 F.2d 294 (5th Cir. 1977); United States v. Medico, 557 F.2d 309 (2nd Cir. 1977)

With that background, a survey of the cases dealing with the admissibility of Grand Jury testimony is enlightening.

In the United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977), the Fifth Circuit encountered a case somewhat similar to the present situation. There, the government attempted to introduce the Grand Jury testimony of a witness who later refused to testify at trial. Although the Court found the witness "unavailable" as defined by the rules of evidence, the Court held his Grand Jury testimony inadmissible. The reasoning of the Court was that the Grand Jury witness had faced unpleasant alternatives during his testimony at the Grand Jury which may have pressured him into making certain statements which the Court could not find "trustworthy."

The similarity of that case with the present situation is noteworthy. As in Gonzalez, Mr. Savage was "unavailable" to testify at trial. As in Gonzalez, Mr. Savage was faced with some unpleasant alternatives during his testimony at the Grand Jury trial

which may have pressured him into making statements which were not "trustworthy." As the testimony at trial indicated, Mr. Savage appeared to have double-collateralized the equipment he allowed the Defendant, Snellen M. Johnson, to use. At the Grand Jury hearing Mr. Savage could have no way of knowing whether the government was investigating his own possible violations of the law in connection with the bank loans. That situation, coupled with the testimony that Mr. Savage was an older gentleman, in poor health, who had always had a poor memory, makes the present situation all the more similar to the Gonzalez case. The Defendant submitted that Mr. Savage's testimony did not have the sufficient degree of trustworthiness to allow it to be intorduced. This is particularly so when his Grand Jury testimony was very brief and did not involve any review of contacts with Mr. Summers, the bank loan officer, although the government

was well aware of Mr. Summer's version of at least one occasion when Mr. Savage was made aware of the need to better identify the property being used as collateral. Its introduction as rebuttal evidence and the manner and method in which it was presented to the jury was also prejudicial as commented below.

In the case of United States v. Fiore, 443 F.2d 112 (2nd Cir 1971), the Second Circuit in a pre-1975 case held prior Grand Jury testimony inadmissible as violative of the liberalized hearsay rules and the confrontation clause of the Sixth Amendment as well. 443 F.2d at 115.

Some cases have allowed the Defendant to use Grand Jury testimony at trial under the theory that the party against whom it is to be used (the government) had adequate opportunity to cross-examine during the Grand Jury testimony. (United States v. Henry, 448 F.Supp. 819 [D. New Jersey 1978] and United

States v. Driscoll, 445 F.Supp. 864 [D. New Jersey, 1978]) Thus, the courts allowed such testimony not under the catchall exception to the hearsay rule, but under Rule 804(b)(1) allowing former testimony where the opportunity to cross-examine was given.

Three post-1975 cases have allowed the admissibility of Grand Jury testimony in a subsequent trial. However, as will be observed, these cases present extradordinary circumstances not found in the instant case.

In United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), the court upheld the admissiblity of Grand Jury testimony in a case where a witness refused to testify at trial and was thus "unavailable" according to the definition thereof in the Federal Rules of Evidence.

The Court allowed the Grand Jury testimony for the reasons that (1) there was substantial circumstantial corroboration of

such testimony, (2) the witness affirmed the veracity of the Grand Jury testimony at a mini-hearing outside the presence of the jury, and (3) the reason the witness refused to testify was he had received threats of harm allegedly from the Defendant. Under such circumstances, the Court found that such testimony was trustworthy and that the Defendant had waived his right to the confrontation clause, reasoning that the Defendant should not be allowed to complain of the silence of the witness when he was the procurer of the silence. 574 F. 2d at 1144.

In United States v. West, 574 F. 2d 1131 (4th Cir. 1978), the Court allowed the use of prior Grand Jury testimony of a witness who had been murdered shortly before the trial. The Court inferred that the Defendant had possibly been responsible for the murder and further found the Grand Jury testimony was trustworthy due to extraordinary corroboration of the Grand Jury tes-

timony. The witness had been wired for sound, his conversations had been recorded, he had been kept under close surveillance when not within buildings and the officers who had watched and recorded his conversations were witnesses available for cross-examination.

Finally, in United States v. Garner, 574 F.2d 1141 (4th Cir. 1978) the Court held admissible the prior Grand Jury testimony of a co-conspirator who refused to testify at trial. The witness refused to answer government questions but indicated he might answer defense counsel questions. For that reason, the trial Court held that the witness was unavailable to the government but that he was available to the Defendant for cross-examination. For those reasons, the Court allowed the admission of his Grand Jury testimony at trial.

In the present case, Mr. Savage was unavailable due to his death, the result of a

heart-attack. He had not been murdered by the Defendant as in West, nor had he refused to testify due to threats from the Defendant as Carlson, nor was he available to answer defense counsel questions as in Garner. There was no extraordinary corroboration of Mr. Savage's testimony nor any affirmation of veracity of the Grand Jury testimony by Mr. Savage. To the contrary, testimony by Clark Oborne indicated that Mr. Savage had repudiated his testimony at a later date. (See Oborne's Testimony, Tr. pp. 727, 741-742. See also Petitioner's Testimony, Tr. p. 827.)

The Court should also be made aware of a 1972 Supreme Court decision which bears directly on the present case. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court referred to a number of general considerations that are relevant to an inquiry as to the trustworthiness of extrajudicial statements:

(1) The time of the declaration and the party to whom the declaration was made;

(2) The existence of corroborating evidence in the case; [and]

(3) The extent to which the declaration is really against the declarant's interest. Chambers v. Mississippi, 410 U.S. at 300-01.

Points 2 and 3 were discussed above; Point 1, however, is extremely pertinent.

Chief Judge Newman, speaking for the Court in Laumer v. United States, 409 A.2d 190 (D.C.C. app. 1979), summarized the basis for the consideration of the time of the declaration:

> "This focus on time is based on the motion that declarations made shortly after the crime for which an accused is charged are often more reliable than those made after a lapse of time. Courts therefore, have been more solicitous of those declarations because the absence of reflection under some circumstances may lessen the opportunity for fabrication." 49 A.2d at 200 (D.C.C. App.)

Thus, in Chambers v. Mississippi, 410

U.S. at 298-303, the Court held that the trial court erred in excluding nearsay statements which were critical to Petitioner's defense and which bore substantial assurances of trustworthiness, on the ground that the declaration was made shortly after the crime and therefore, was a strong indication of reliability.

In contrast, the court in United States v. Guillette, 547 F.2d 743 (2nd. Cir. 1976), found that the declarant's inculpatory statement which was made some four (4) months after the crime was too attenuated and remote to provide assurance of reliability. Id. at 759. (emphasis added.)

Further, in United States vs. Satterfield, 572 F.2d 687 (9th Cir. 1978), the Ninth Circuit held that a two-year lapse between the crime and declaration casts doubt on the reliability of the statements, and "reduces their trustworthiness." Id. at 693, citing, United States v. Oropeza, 564

F.2d 316, at 325 (9th Cir. 1978). Similarly, the Ninth Circuit held in Oropeza that one of its reasons for finding that the trial court did not err in excluding a hearsay statement was that "the statement was not spontaneous..." Id. at 325.

In contrast, Mr. Savage's testimony was neither four (4) months nor two (2) years after the alleged crime was charged, but was given some four (4) years after the alleged act. The time frame of the hearsay statements in Chambers, Guillette, Satterfield and Oropeza was central to each decision and the time lapse in those cases was significantly less than the four (4) year delay in the present case. (emphasis added) This considerable time chasm between the alleged act and declarant's statement, when coupled with both the trial testimony that Mr. Savage always had a poor memory and the testimony at trial by Mr. Oborne, which repudiates the statements of Mr. Savage,

cast grave doubts as to the reliability of Mr. Savage's testimony.

In fact, the only factor which is at all supportive of the trustworthiness of the hearsay in question is the fact that the Grand Jury testimony was given under oath. Yet our legal experience makes it painfully clear that statements under oath hardly guarantee trustworthiness. What may produce a trustworthy statement, however, is one which is subject to cross-examination.

The eminent legal scholar, Dean Wigmore, has observed that cross-examination "is beyond any doubt the greatest legal engine of truth," and absent political considerations, "cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improve methods of trial procedure." 5 Wigmore; Evidence, Section 1376 (3d ed, 1940).

This view has been thoroughly embraced

in American jurisprudence, and the purpose of the Sixth Amendment provision was stated in 1895 in Mattox v. United States, (156 U.S. 237, 242-243):

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

In 1899, in Kirby v. United States, 714 U.S. 47, 55, 56 (1899), the Court emphatically affirmed Mattox in stating that the right of confrontation is

> [o]ne of the fundamental guarantees of life and liberty...long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution of the United States and in

> constitutions of most if not all the states composing the Union.

Further, in Alford v. United States, 282 U.S. 687, (1931). Mr. Justice Stone, in writing for the Court, said of the right to cross-examination:

> one of its purposes is to discredit the witness by showing that his testimony in chief was untrue or biased. Id., at 51 S.Ct. 219. See also, Tla-Koo-yel-lee v. United States, 167 U.S. 274; King v. United States, (C.C.A.) 112 F. 988; Farkas v. United States, (C.C.A.) 2 F.2d 644; Furlong v. United States, (C.C.A.) 10 F.2d 492, 494.

Justice Stone added that:

> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (Tla-Koo-yel-lee v. United States, 167 U.S. 274; King v. United States, [C.C.A.] 112 F. 988; People v. Moore, 96 App.Div. 56, 89 N.Y.S. 83, affirmed without opinion, 181 N.E. 524, 73 N.B. 1129.)

In 1967 in Washington vs. Texas, 388 U.S. 14, (1967), Chief Justice Warren, writing for the Court, held that:

> the right to confront the prosecution's witnesses for the purpose of challenging their testimony...is in plain terms, the right to present a defense, and a fundamental element of due process of law. 388 U.S., at 20.

In Greene vs. McElroy, 360 U.S. 474, (1959), the Court had said of confrontation and cross-examination:

> They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been jealous to protect these rights from erosion. 360 U.S., at 496-497, 79 S. Ct., at 1413.

In Re: Oliver, 333 U.S. 257, (1947), the Court said:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in Court--are basic to our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. 333 U.S., at 273, 68 S.Ct., at 507. (Emphasis added.)

In 1968, in Pointer v. Texas, 380 U.S. 400, (1965) the Court, speaking through

Justice Black, held that

> cross-examination has value in exposing the falsehood and bringing out the truth in the trial of a criminal case. Id., at 1066.

Further, the Court said that:

> The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the dicisions of this Court and other Courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for Defendants in criminal cases. Id., at 1068.

In Barber v. Page, 390 U.S. 719 (1968), the Court refused to permit the State to use the preliminary hearing testimony of a witness in jail in a Federal Prison in another State at the time of trial. The Court acknowledged the hearsay exception permitting the use of such evidence when a witness was unavailable but refused to find him "unavailable" when the State had made no effort

to procure him. The ruling in Barber was upheld in Berger v. California, 393 U.S. 314 (1968) in which the Court observed that,

> [c]learly, Petitioner's inability to crossexamine Duston (declarant) at trial may have had a significant effect on the 'integrity of the fact-finding process.' (Citing Linkletter v. Walker, 381 U.S. 618, 639 [1965]; Ct. Roberts v. Russell, 392 U.S. 293 [1968].)

The Berger Court observed that:

> as we pointed out in Barber v. Page, one of the important objects of the right to confrontation was to guarantee that the fact-finder had an adequate opportunity to assess the credibility of witnesses." (390 U.S. at 721)

Before the grand-jury, there was, of course, no cross-examination of Mr. Savage. As mentioned, to admit hearsay under the catchall clause, the hearsay must have guarantees of trustworthiness equivalent to those provided in 804(b)(1)(2)(3) and (4). Since in this case, admitting the questioned hearsay would, without 804(b)(5) otherwise violate defendant's Sixth Amendament right

of confrontation and cross-examination, in order to be admitted, the hearsay must have guarantees of trustworthiness equivalent to 804(b)(1), as that is the exception under which the Sixth Amendment rights are protected.

The test for admitting the hearsay in question under 804(b)(5) in this case, then, is finding guarantees of trustworthiness equivalent to the guarantees provided by the Sixth Amendment right to confrontation and cross-examination.

Such a test cannot be met in this case.

In summary, there are several salient indicators which cast strong doubt upon trustworthiness of the testimony of Mr. Savage:

1. Mr. Savage's testimony at trial was contradicted by Mr. Summers, another witness. (Trial P. 1170.) This is terribly important because the government, in its brief, relies heavily on Mr. Summers corro-

boration of the testimony of Mr. Savage to indicate "equivalent guarantees of trustworthiness," yet, in point of fact, there is no corroboration. This is an exceptionally strong factor which argues against the trustworthiness of Mr. Savage's testimony, a factor which the Court of Appeals has overlooked in considering whether there was an abuse of discretion by the trial court in admitting this testimony. At the very least, the contradiction of Mr. Savage's testimony, by another key witness, Mr. Summers, is enough to cast doubt on the trustworthiness of mr. Savages' testimony, and when coupled with the following factors, leaves no doubt that the testimony of Mr. Savage should not have been admitted under Rule 804(b)(5).

2. Mr. Savage's testimony was given some four (4) years after the alleged act. Though the Circuit Court notes that the indictment was brought within the applicable

Statute of Limitations, that surely cannot be the reason for overlooking the long period of time which elapsed between the alleged act and Mr. Savage's statement. Indeed, Chambers, Guillette, Satterfield, and Oropeza each take account solely of the time lapse because that is crucial to the validity and "guarantees of trustworthiness" of the declaration. Moreover, the time lapse differs in importance from case to case depending on the degree of dimmed memories, lost documents and so forth. Here the time lapse is critical, and it is but another factor against the trustworthiness of Mr. Savage's statements.

3. In addition, the time lapse between the alleged act and Mr. Savage's declarations becomes even more important given the trial testimony that Mr. Savage had always had a poor memory.

4. Moreover, not only was the testimony of Mr. Savage contradicted by that of Mr.

Summers, but it was also repudiated at trial by the testimony of Mr. Oborn. Thus, there are two witnesses whose statements collide with those of Mr. Savage. That certainly must cast grave doubts as to the reliability of Mr. Savage's testimony.

5. Futhermore, the evidence at trial revealed that Mr. Savage had apparently not fully paid for the farm equipment in question. It certainly would be expected that under those circumstances, that Mr. Savage would testify in what would appear to be his best interest, which was to deny giving any permission to use the equipment as collateral. That kind of a self-serving statement does not meet the requisite guarantee of trustworthiness of reliability.

Any one of these several factors, taken alone casts significant doubt on the reliability of Mr. Savage's testimony and each individually is sufficient to remove the testimony from the parameters of Rule 805

(b)(5). Most certainly when these factors are considered together, as they must be, the doubt in the trustworthiness of Mr. Savage's testimony is overwhelming. It is thus painfully clear that the trial court erred in admitting the testimony under the hearsay exception rule, for it does not meet the requisite "equivalent guarantees of trustworthiness" and the Circuit Court either misapprehended or overlooked these matters when affirming the lower court's decision.

On pages 4 and 5 of its slip opinion, the Circuit Court discusses impeachment and the oddity of allowing Defendant to bring in hearsay under one exception and then refusing to let the government bring in relevant hearsay under another exception. However, this discussion seems but judicial dicta, since the Circuit Court's decision on Point 2 turns on a finding of no "abuse of discretion" in the trial court. Nonetheless, in

using the notion of fairness to support its conclusion, the Circuit Court overlooked and misunderstood an important point of law.

The trial court's view that if it was "fair" for the defense to introduce hearsay, the government, by way of rebuttal, should be afforded the same opportunity, violates the structure of Rule 804(b)(5).

At trial, the testimony of Defendant, Snellen M. Johnson, that Mr. Savage had given him permission to pledge the property as collateral for the bank loans in question, was admitted, on the ground it was contrary to the declarant's pecuniary of proprietory interest and it therefore qualified as an exception to the rule against hearsay. That clearly was an appropriate action by the trial court because it was consistent with Rule 804(b)(3). The trial court, as the Circuit Court was aware, then proceeded to admit the grand jury testimony of Mr. Savage on the ground that:

> if it was fair for the defense to introduce hearsay, the government, by way of rebuttal, should be afforded the same opportunity. Be that as it may, a trial court now has some latitude in admitting hearsay, and we find no abuse of discretion here." (Slip Opinion, Page 5.)

While the issue of fairness has its place, the trial court has ignored a basic principle in American jurisprudence that, in many cases, fairness depends on accordance with procedures and standards, such as are established in Rule 804(b). The view taken by the trial judge that "fair is fair" and so Mr. Savage's testimony should be admitted, is erroneous and improper if not done in accordance with Rule 804(b)(5). In point of fact, Rule 804 (b)(5) was <u>ignored</u> by the trial judge. Indeed, how could it have been otherwise? As demonstrated above, Mr. Savage's testimony clearly did <u>not</u> meet the stringent "equivalent guarantees of trustworthiness" test and, therefore, should not have been admitted.

It is true, of course, that on

occasion, what seems to be "fair" in the opinion of a judge must give way if that perception is at odds with legitimate standards and procedures enunciated in legislation. In the present case, "fair is fair" is not the standard congress had in mind when it drafted Rule 804(b)(5). Rather, this catchall hearsay exception, which is to be "rarely" used (Moore's Federal Practice, Volume 11, P. 209) mandates that before a statement may be admitted, it must have "equivalent guarantees of trustworthiness." Mr. Savage's testimony failed to meet that test.

Petitioner in the instant case was not afforded the time-honored guarantees of a fair trial. There was no opportunity to "sift the conscience" of the witness to determine whether declarant's statement was "worthy of belief." This denial alone, is sufficient ground for dismissal of the case or, at the very least, a reversal. The

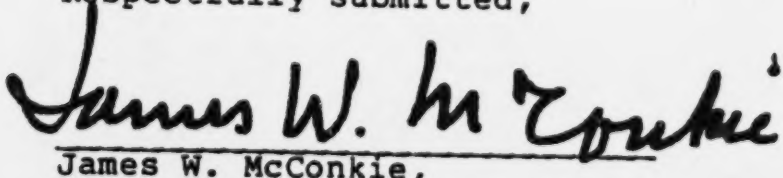
Supreme Court should not let the Circuit Court decision stand for to reinstate it sets an egregious and ominous precedent. A Supreme Court decision is needed to correct the error, define the scope, meaning and proper application of 804(b)(5).

CONCLUSION

Therefore, Petitioner prays that a Writ of Certiorari be granted.

DATED this 12th day of March, 1981.

Respectfully submitted,



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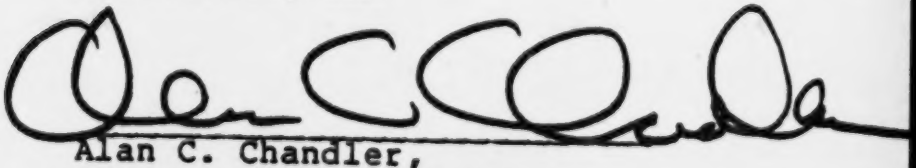

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CERTIFICATE OF MAILING

I hereby certify that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari was mailed 1st class - Postage Paid and deposited in a U.S. Mailbox to:

Ronald L. Rencher, U.S. Attorney, and
Christine F. Soltis, Assistant
200 Post Office & Courthouse Building
Salt Lake City, Utah 84101

and one copy to:

The Solicitor General's Office
Department of Justice
Washington, D.C. 20530

on this 12th day of March, 1981.

Ellen L. Hall

Ellen L. Hall

APPENDIX

APPENDIX

Page

SLIP OPINION, (December 29, 1980) UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, UNITED STATES OF AMERICA, Plaintiff-appellee, v. SNELLEN M. JOHNSON, Defendant-appellant---------- A2

ORDER (January 14, 1981) OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITIONERS PETITION FOR REHEARING.---------- A13

RULE 804(b)(5) OF THE FEDERAL RULES OF EVIDENCE---------- A14

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES---------- A15

THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES---------- A16

12-29-80 79-2196

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Slip Opinion

NOT FOR ROUTINE PUBLICATION

(See Our Local Rule No. 17)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

(FILED - United States Court of Appeals, Tenth Circuit - Dec. 29, 1980 - Howard K. Phillips, Clerk)

No. 79-2196

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SNELLEN M. JOHNSON, Defendant-Appellant.	Appeal from the United States District Court for the District of Utah, Central Division (D.C. No. CR-79-00062-01)

Christine Fitzgerald Soltis, Assistant United States Attorney (Ronald L. Rencher, United States Attorney, with her on the brief), Salt Lake City, Utah, for Plaintiff-Appellee,

Alan C. Chandler (James W. McConkie of Parker, McKeown, McConkie & Hill with him on the brief), Salt Lake City, Utah, for Defendant-Appellant.

Before McWILLIAMS, BREITENSTEIN AND DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

Snellen Johnson was charged in a ten count indictment with the making, and with aiding and abetting in the making, of false statements in loan applications to a federally insured bank in violation of 18 U.S.C. Section 1014 and Section 2. A jury convicted Johnson on six of the ten counts, and he was sentenced to two years imprisonment on each of the six counts, the several terms to be served concurrently, not consecutively. Johnson appeals from the sentences thus entered.

Johnson's first ground for reversal is pre-indictment delay. The transactions which formed the basis for the present prosecution occurred between January and July, 1975. The indictment was returned on April 27, 1979, well within the applicable five-year statute of limitations. Three

days prior to the date the case was set for trial, Johnson moved to dismiss the indictment because of pre-indictment delay. A full evidentiary hearing was held on Johnson's motion to dismiss. An FBI agent testified concerning his investigation into the matter. The final FBI report, consisting of some 200 pages, was completed, and submitted to the United States Attorney's office on February 20, 1979. At the hearing on the motion to dismiss both parties also submitted written memoranda and various supporting affidavits. At the conclusion of this hearing the trial court denied the motion to dismiss, and this ruling is now urged as ground for reversal. We are not in accord with this argument.

Much has been written on the subject of pre-indictment delay. It is not necessary, however, to review all of the authority bearing on the matter here. It is sufficient to note that Johnson failed to esta-

blish prejudice resulting from delay. He did claim prejudice on the ground that the approximately four-year delay between the initiation of the FBI investigation and the return of the indictment had dimmed the memories of potential witnesses. Such fact, if it be a fact, is not in itself sufficient to demonstrate that Johnson did not receive a fair trial. United States v. Marion, 404 U.S. 307 (1971).

Also, Johnson based his claim of prejudice on the fact that Ven Savage, who was apparently to be both a Government and a defense witness, died unexpectedly about one month before the trial of the case. The death of a potential defense witness was also present in United States v. Lovasco, 431 U.S. 783 (1977). In Lovasco the Supreme Court held that even though pre-indictment delay may result in some prejudice, the Government may nonetheless still prosecute a defendant where the delay is "good faith

investigative delay." Id. at 796. In the instant case there is nothing to indicate bad faith on the part of the government in regard to the delay. The FBI investigation was thorough, involved many persons and, as indicated, the final report consisted of over 200 pages. Most certainly, there is no suggestion that the delay was caused by any desire on the part of the Government to gain some tactical advantage over the defendant. United States v. Radmall, 591 F. 2d 548 (10th Cir. 1978) and United States v. Revada, 574 F. 2d 1047 (10th Cir. 1978). Under the circumstances, the trial court did not err in denying the motion to dismiss based on pre-indictment delay.

As indicated, a few weeks before trial Ven Savage died. Apparently, both the Government and the defendant proposed to call Savage as a witness. Savage had previously testified before a Grand Jury that he had not given Johnson permission to

pledge certain items of personal property as collateral for the loans which Johnson ultimately received from the federally insured bank. But, according to Johnson, who testified on his own behalf at the trial, Savage had in fact given him permission to pledge the property in question. Johnson's testimony that Savage had given him permission to pledge the property was admitted, over strenuous objection, on the ground that it was something akin to a statement contrary to the declarant's pecuniary or proprietary interest and therefore qualified as an exception to the rule against hearsay. By way of rebuttal, the Government sought and, over objection, received permission to have read to the jury Savage's sworn testimony to the Grand Jury wherein he testified that he had not given Johnson permission to pledge the property in question as collateral for loans from which Johnson ultimately received the proceeds.

Under the described circumstances, we find no error.

Demonstrating that a witness on a prior occasion has made statements which differed from his testimony in a judicial proceeding has long been an accepted method of impeaching a witness's credibility. Fed. R. Evid. 613. If Savage had himself testified that he had previously given Johnson permission to pledge the property in question as collateral for the various loans, it would have been perfectly proper for the Government to show, by way of rebuttal, that Savage had testified before a Grand Jury that he had not given such permission to Johnson. Such being the case, it would seem odd that Savage's testimony before the Grand Jury becomes inadmissible when the defense has interjected the same issue into the case, i.e., permission or non-permission, through the use of some doubtful hearsay testimony. To hold to the contrary would mean that

Johnson would be at liberty to testify as to his conversation with Savage, without fear of impeachment. The trial court was of the view that if it was "fair" for the defense to introduce hearsay, the Government, by way of rebuttal, should be afforded the same opportunity. Be that as it may, a trial court now has some latitude in admitting hearsay, and we find no abuse of discretion here. Fed. R. Evid. 804(b)(5).

Johnson contends that there is insufficient evidence to sustain his conviction under Count Four of the indictment. As stated, a jury convicted Johnson on six different counts, including Count Four in the indictment. He was sentenced to a term of two years imprisonment on each of the six counts, such terms to be served concurrently. So, even if Johnson's attack on his conviction under Count Four be successful, he would still be faced with five two-year sentences to be served concurrently. Since

we conclude that Johnson's convictions under the remaining five counts are all valid, we decline to review his challenge to his conviction on Count Four. We perceive no "spill over" from his conviction on Count Four which would taint his conviction on the other counts in the indictment. There is nothing to indicate that Johnson would be in a better position if he were to stand convicted on only five counts of the indictment, as opposed to the six counts on which he now stands convicted. It is on this basis that we decline to consider Johnson's conviction under Count Four of the indictment. Barnes v. United States, 412 U.S. 837 (1973); United States v. Vargas, 615 F. 2d 952 (2d Cir. 1980); United States v. Venema, 563 F. 2d 1003 (10th Cir. 1977); United States v. Smith, 532 F. 2d 158 (10th Cir. 1976); and United States v. Tager, 479 F. 2d 120 (10th Cir. 1973), cert. denied, 414 U.S. 1162 (1974).

The fourth, and last, ground for reversal is that there was a fatal variance between the charges in the indictment and the evidence offered at trial. We find no such variance. The gist of the several charges against Johnson was that he, acting both for himself and through various other persons, made false statements to a Utah bank concerning ownership of collateral given to secure such loans, with the proceeds from all loans going to Johnson, or a company which he controlled. Johnson was charged both as a principal, and as an aider and abettor, and the jury returned a verdict of guilty as to six counts of the indictment on the basis of the proffered evidence. In short, we find not fatal variance between charge and proof.

Judgment affirmed.

NOVEMBER TERM-January 14, 1981

Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein and Honorable William E. Doyle, Circuit Judges.

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 79-2196
v.	)	
SNELLEN JOHNSON,	)	
Defendant-Appellant.	)	

This matter comes on for consideration of the petition of appellant for rehearing filed January 12, 1981.

Upon consideration whereof, the petition for rehearing is denied.

/s/

HOWARD K. PHILLIPS, Clerk

THE FEDERAL RULES OF EVIDENCE

RULE 804(B)(5)

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is move probative on the point for which is is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence....

THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or perperty, without due process of law; nor shall private property be taken for public use, without just compensation.

THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defense.

Office Supreme Court, U.S.
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CLERK

No. 80-1569

In the Supreme Court of the United States

OCTOBER TERM, 1980

SNELLEN M. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the delay between the time of the offense and the time of the indictment deprived petitioner of due process of law.

2. Whether the government may introduce the grand jury testimony of a deceased individual to impeach or rebut testimony of defense witnesses concerning statements allegedly made by that individual.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

United States v. *Lai Ming Tanu*, 589 F.2d 82	7-8
United States v. *Lovasco*, 431 U.S. 783	5, 6
United States v. *Marion*, 404 U.S. 307	5, 6
United States v. *Winkle*, 587 F.2d 705	11

Constitution, statutes and rules:

United States Constitution:	
Fifth Amendment (Due Process Clause)	5
Sixth Amendment (Confrontation Clause)	9
18 U.S.C. 2	2
18 U.S.C. 1014	2
Fed. R. Evid.:	
Rule 801(c)	11
Rule 804(b)(3)	9
Rule 804(b)(5)	10

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1980. A petition for rehearing was denied on January 14, 1981. The petition for a writ of certiorari was filed on March 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted on six counts of making false statements on loan applications to a federally insured bank, in violation of 18 U.S.C. 1014 and 2 (Pet. App. A4). He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. A3-A12).

1. The evidence showed that in 1974 and 1975 petitioner was president and major stockholder of International Resources, the holding company for two other companies operated by petitioner (Tr. 569-570, 811, 903). International Resources did not have a solid financial base(Tr. 571). Because of the company's precarious financial condition, petitioner approached Stephen Summers, a loan officer at Commercial Security Bank in Murray, Utah, to discuss the possibility of obtaining a loan for International Resources (Tr. 176, 822-823). Summers did not have the authority to make a single loan in the amount sought, but he indicated that he could probably make several smaller loans to individuals if the loans were fully collateralized (Tr. 178-181). Additionally, Summers stated that the individuals who signed for the loans had to qualify and that the collateral had to be in the names of the individuals and to be free of any encumbrances (Tr. 181, 184).

Subsequently, petitioner gave Summers two lists containing an inventory of equipment from the Kearns and Aitken ranches in Winnemucca, Nevada, which petitioner represented he had just purchased (Tr. 201-202, 207). The Kearns ranch was actually leased at the time by Ven Savage and Arthur Sant,

who began the process of purchasing the property under a lease-purchase agreement in the spring of 1975 (Tr. 518-520). Sant and Savage had considered selling the ranch to International Resources. As part of the negotiations, Savage listed the ranch equipment as a preparatory step to the drafting of a sales contract (Tr. 522, 528-531). This list was the same as the one that petitioner gave to Summers (Tr. 529-531). International Resources never purchased the Kearns ranch, and Sant never gave permission for any of the equipment to be pledged as collateral (Tr. 532-533, 780). Savage also had previously given petitioner an inventory list of the equipment on the Aitken ranch.[1]

In addition to furnishing Summers the two inventory lists, petitioner, together with his brother, Lyle Johnson, and an associate, Clark Oborn, arranged for several individuals to sign for loans (Tr. 195). Loans were in fact made, with these individuals as the named payees and with equipment from the ranch inventory lists serving as collateral (Tr. 221-222, 227-232, 248-249, 271-272, 294-295). Rather than going to the named borrowers, the loan proceeds inured to the benefit of petitioner or his companies, primarily by being used to fund cashiers' checks previously issued without funding (Supp. Tr.

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[1] Savage and Sant had also considered purchasing the neighboring Aitken ranch (Tr. 552-553). In conjunction with this transaction, Savage made a list of the equipment on the Aitken ranch, for the purpose of arranging financing (Tr. 555). This list of equipment was also given to Summers as a description of collateral on the loans. However, no sale was ever made, and John Aitken, the owner, did not give permission for any of the ranch equipment to be pledged as collateral (Tr. 551).

49; Tr. 74-75, 223-224, 234-235, 257-259, 270, 273-276, 294-295, 615-616).[2]

2. The indictment was returned on April 27, 1979 (Pet. App. A4). Three days prior to a rescheduled trial date of August 27, 1979, petitioner moved to dismiss the indictment on the basis of prejudicial pre-indictment delay (*id.* at A4-A5). Petitioner alleged, *inter alia*, that as a result of the delay he had lost a crucial defense witness, Ven Savage, who had died approximately one month prior to trial, and that the memories of some of the witnesses had dimmed. Following an evidentiary hearing on the matter, the motion was denied. The district court concluded that there had been no showing of a deliberate delay by the government to gain a tactical advantage and that petitioner failed to establish actual prejudice to his case (Pet. App. A5-A7; Pet. 13-14).

ARGUMENT

1. Petitioner contends (Pet. 11-35) that the court of appeals erred in affirming the district court's denial of his motion to dismiss the indictment—a motion predicated on the delay of approximately four years between the commission of the offenses and the return of the indictment. This claim is without legal or factual support.

The charged offenses in this case took place sometime between January and July of 1975. Thereafter, the FBI conducted an investigation; by October 1975, the FBI had discovered only the possibility of irregularities in connection with certain loans. A 200-page report—the result of a "thorough investiga-

[2] "Supp. Tr." refers to the transcript of a portion of the trial held on Sept. 19, 1979, which is separately paginated.

tion"—was submitted to the United States Attorney's office on February 20, 1979 (Pet. 7-8; Pet. App. A5).[3] The indictment was returned on April 27, 1979, which was within the five-year statute of limitations. The case was originally scheduled for trial on July 9, 1979, but petitioner sought a continuance that resulted in rescheduling of the trial for August 27, 1979. On August 14, 1979, Ven Savage died suddenly of a heart attack (Pet. 9).

In affirming the district court's denial of petitioner's motion to dismiss for pre-indictment delay, the court of appeals stated that petitioner "failed to establish prejudice resulting from delay" (Pet. App. A5-A6) and that even assuming that the delay had resulted in some prejudice, there was no showing that the delay was anything other than good faith " 'investigative delay' " (Pet. App. A6-A7, quoting *United States* v. *Lovasco*, 431 U.S. 783, 796 (1977)). This holding is consistent with this Court's decisions in *United States* v. *Lovasco*, *supra*, and *United States* v. *Marion*, 404 U.S. 307 (1971), and it does not conflict with decisions of any other court of appeals.[4]

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[3] The FBI investigated approximately 18 persons who had signed for loans, 22 actual loans, 11 floating cashier's checks, and 25 separate pieces of collateral, which were located in Utah, Nevada, and Montana.

[4] Although the Tenth Circuit does not phrase its test in precisely the terms used by courts of appeals in other circuits (see cases cited at Pet. 20-22), the standards are consistent. All of the courts of appeals consider the same factors—actual prejudice and reasons for delay. Given the insufficient showing of prejudice in this case and the government's explanation of the delay (see page 7, *infra*), there is no basis for concluding that petitioner would have fared better in another circuit. We note that in none of the decisions from other circuits on which petitioner relies (Pet. 20-22) did the court find a violation of the Due Process Clause.

Lovasco and *Marion* establish that a due process violation is not made out absent a showing of prejudice resulting from the delay and that even where some prejudice is shown, a violation will not be found where there is no showing that "delay was an intentional device to gain tactical advantage over the accused" (*United States* v. *Marion*, *supra*, 404 U.S. at 324) or that the government's reasons for the delay otherwise violate "those 'fundamental conceptions of justice which lie at the base of our civil and political instiutions,' *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935)" (*United States* v. *Lovasco*, *supra*, 431 U.S. at 790).

Here, petitioner's only particularized claim of prejudice relates to the deceased witness, Ven Savage, and that claim is clearly insufficient to satisfy this prong of the due process test.[5] Relying on an affidavit of his trial attorney and on testimony of Clark Oborn, one of his associates, regarding a pretrial interview with Savage, petitioner contends (Pet. 27-29) that Savage would have testified that he had given petitioner permission to pledge the ranch equipment as collateral. But it is speculative indeed to assume that Savage, whom the government was planning to use as its trial witness, would, at trial, have contradicted his sworn testimony before the grand jury that he had *not* given petitioner permission to make such use of the equipment. In view of Savage's

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[5] Petitioner makes a bald allegation that memories have dimmed as a result of the delay, without specifically stating which witnesses were thus affected and what testimony favorable to petitioner they might otherwise have given. Such bare claims are insufficient to establish actual prejudice. See *United States* v. *Marion*, *supra*, 404 U.S. at 325-326. Petitioner's claims respecting lost documents are similarly infirm because of his failure to explain what such documents might have shown in aid of his defense.

failure to communicate to the government any such contemplated change of testimony, this claim is too slender a reed on which to rest a finding of actual prejudice to the defense.[6]

Even assuming that some prejudice was established, the courts below were nevertheless correct in finding no violation of due process. The government came forward with explanations for the delay, offering one of the FBI investigators as a witness at the evidentiary hearing (Pet. App. A5). As noted above, investigation of the case required tracking down a number of bank transactions and items pledged as collateral and tracing the connections between them. The indictment was returned in little more than two months after the prosecutor received the FBI's 200-page report on the matter, and the government proceeded expeditiously thereafter. Indeed, had petitioner himself not successfully moved for a continuance of the trial, originally scheduled for July 9, 1979, Savage would have been able to testify as a trial witness, since his fatal heart attack did not occur until August 14. In sum, it is clear that the government did not delay the case in order to gain any tactical advantage over petitioner with respect to Savage's testimony, that there was "nothing sinister" generally with respect to the government's investigation of the case (*United States* v. *Lai Ming Tanu*,

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[6] It is also noteworthy that, according to Oborn's account (Tr. 1052), Savage's purported repudiation of his grand jury testimony in his interview with petitioner's trial counsel was quite equivocal. Oborn testified (Tr. 1052) that Savage stated that he had "forgotten" to tell the grand jury that he had given petitioner the "opportunity to use that collateral" and that if he "hadn't given" petitioner such an opportunity, then "he would give it."

589 F.2d 82, 89 (2d Cir. 1978)), and that, under all the circumstances, the delay was not oppressive government action constituting a violation of petitioner's rights to due process.

2. Petitioner also contends (Pet. 35-65) that the district court erred in admitting Savage's grand jury testimony into evidence. In particular, he argues that the testimony was hearsay of insufficient reliability to warrant admission. The court of appeals properly rejected this claim (Pet. App. A7-A10).

As part of the defense case, petitioner's business associate, Clark Oborn, testified (Tr. 741-742) that petitioner—in Savage's presence—had stated that Savage would allow International Resources to use equipment on his ranch as loan collateral; and petitioner testified (Tr. 827-828) that Savage had given such permission.[7] The government objected to

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[7] As petitioner indicates (Pet. 43), loan officer Stephen Summers testified (Tr. 271-273, 279-285) that he had received some serial numbers for the ranch equipment from Savage and had stated in Savage's presence that it was essential that the equipment be free and clear so as to be usable as loan collateral. Summers later qualified that testimony, however, by testifying (Tr. 293, 360-361) that he believed Savage was obtaining the serial numbers simply because he knew people on the ranches, not because he had any interest in the equipment, and that Summers was not sure that he had specifically mentioned loans in Savage's presence, although he had stated that the equipment had to be "free and clear." Even more significantly, Summers testified (Tr. 187-188, 191, 201-202, 291, 362-363) that petitioner's representation to him was not that Savage had given petitioner permission to use the ranch equipment as collateral but that petitioner's company had purchased both the Aitken and Kearns ranches and owned the equipment as well. Furthermore, the loan collateral consisted of equipment from both the Kearns ranch that Savage

the introduction of any testimony concerning Savage's alleged statements or his agreement with statements allegedly made in his presence, pointing out that, if it were introduced, the government would want to impeach the testimony by use of Savage's contrary grand jury testimony (Tr. 729-740). The trial court ruled that defense testimony along the indicated lines would be admissible hearsay, pursuant to Fed. R. Evid. 804(b)(3), because it was contrary to Savage's pecuniary interest, to the extent of his equity in the ranch equipment (Tr. 734-739). The government, on rebuttal, did subsequently introduce Savage's grand jury testimony (Tr. 1041-1050) in order to impeach the testimony of petitioner and Oborn. The defense was then permitted to present Oborn's testimony that Savage had repudiated his statements to the grand jury (see note 6, *supra*). In agreeing to admit the grand jury testimony, the trial court noted (Tr. 1019-1020) that the defense had been permitted, under an exception to the hearsay rules, to introduce testimony concerning statements allegedly made by Savage and that the prosecution should be permitted in rebuttal to introduce Savage's statements to the grand jury as long as there were "some guarantees of trustworthiness."

We do not concede that the trial court erred in its judgment of the trustworthiness of Savage's statements made under oath to the grand jury or that admission of those statements was contrary to the Confrontation Clause of the Sixth Amendment or to

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and Sant purchased and the Aitken ranch, which neither they nor petitioner at any time owned (see note 1, *supra*). (Petitioner's reference (Pet. 57) to "Trial P. 1170" as reflecting contradictory testimony by Summers may be a misprint, since the last page of trial testimony is numbered 1054.)

Fed. R. Evid. 804(b)(5), the so-called catch-all provision for exceptions to the general bar against hearsay. In any event, contrary to petitioner's suggestion (Pet. 35-36), this is not an appropriate case in which to review the application of the Confrontation Clause to the grand jury testimony of unavailable witnesses or to "define the scope, meaning and proper application" of Rule 804(b)(5). There is no conflict among the circuits created or perpetuated by the decision below. The cases on which petitioner relies all concern the use of such testimony in the government's case in chief. None resembles the unusual situation here, in which the government and the defense each asserted that the unavailable witness would support its case, and the government introduced the grand jury testimony in rebuttal only after the defense had introduced other evidence of inconsistent statements allegedly made by the deceased witness. Here the testimony was properly used in the nature of impeachment. As the court of appeals noted (Pet. App. A9), "[i]f Savage had himself testified that he had previously given Johnson permission to pledge the property in question as collateral for the various loans, it would have been perfectly proper for the Government to show, by way of rebuttal," that Savage had testified to the contrary; and "it would seem odd that Savage's testimony before the Grand Jury becomes inadmissible when the defense has interjected the same issue into the case, i.e. permission or non-permission" by way of defense witnesses' testimony concerning Savage's alleged statements. The case therefore comes within the general principle that "impeachment to demonstrate the untruth of a witness' testimony is not excludable as hearsay because it is not offered pri-

marily to prove the truth of the matter asserted, but to contradict the prior testimony." *United States* v. *Winkle*, 587 F.2d 705, 710 (5th Cir. 1979); Fed. R. Evid. 801(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
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MAY 1981

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